

PREFACE TO THE WETLANDS PROTECTION ACT REGULATIONS, 2004 PROPOSED REVISIONS

General Approach

The Department is proposing revisions to the wetlands protection regulations in part to respond to recent data showing greater than expected loss of wetlands, particularly from unpermitted alterations of resource areas. By reallocating resources from issuing permits for work in the outer portion of the buffer zone, the Department can increase its outreach and enforcement efforts to address illegal filling of wetlands. The proposed revisions allow a reduction of time spent by both conservation commissions and the Department in reviewing proposed activities in the buffer zone that will result in small or no impacts to wetlands. At the same time, clarifying aspects of the regulations governing work in resource areas, particularly the review of work in the buffer zone under a Notice of Intent and the exercise of discretion in allowing alteration of bordering vegetated wetlands, will improve consistency and strengthen the protection of resource areas. The revisions will enhance wetlands protection by allowing reallocation of resources to enforcement and review of projects with greater impacts.

The Department convened an advisory committee consisting of development, conservation commission, and environmental interests. After exploring several options, discussions concluded with the concept of a simplified review process for eligible projects attempts to maximize the preservation of the role of the buffer zone role in wetlands protection within the regulatory context. These regulations create incentives for applicants to construct projects further from the wetland and to provide additional wetland protections through setback distances, a method long employed by many municipal ordinances and bylaws. In return for these additional safeguards, the procedural aspects of approval and the opportunities for appeals are reduced. Therefore, the 50' setback for simplified review will assist in the preservation of many wetland functions. In addition, the Department has strengthened the language detailing the right of the issuing authority to condition projects in the buffer zone to protect wetland functions.

Background on Buffer Zones

Since the buffer zone was adopted as a regulatory mechanism in 1983, research on the functions of buffer zones and their role in wetlands protection has clearly established that buffer zones play an important role in preservation of the physical, chemical and biological characteristics of the adjacent resource area. Although jurisdiction over work in the buffer zone remains contingent upon a conclusion by the issuing authority that work near resource areas will result in their alteration, review of work in the buffer zone is likely to support the ability of wetlands to contribute to the protection of the interests of the Act. The potential for adverse impacts to resource areas from work in the buffer zone increases with the extent of the work and the proximity to the resource area.

Extensive work in the inner portion of the buffer zone, particularly clearing of natural vegetation and soil disturbance is likely to alter the physical characteristics of resource areas by changing their soil composition, topography, hydrology, temperature, and the amount of light received. Soil and water chemistry within resource areas may be adversely affected by work in the buffer zone. Alterations to biological conditions in adjacent resource areas may include changes in plant community composition and structure, invertebrate and vertebrate biomass and species composition, and nutrient cycling. These alterations from work in the buffer zone can occur through the disruption and erosion of soil, loss of shading, reduction in nutrient inputs, and changes in litter and soil composition that filters runoff, serving to attenuate pollutants and sustain wildlife habitat within resource areas.

Standards for Work in the Buffer Zone under a Notice of Intent

The revised regulation establishes a narrative standard for work in the buffer zone performed under a Notice of Intent. Conditions on work in the buffer zone may include erosion controls, a clear limit of work, preservation of natural vegetation adjacent to the resource area, and design review to avoid alteration of wetlands. Characteristics of the buffer zone at a particular site, such as the presence of steep slopes or the absence of natural vegetation, may increase the potential for adverse impacts on resource areas. The review and conditioning of activities in the buffer zone should be commensurate with the extent and location of the work in the buffer zone and its potential to alter resource areas. The standard is intended to provide better guidance to applicants, conservation commissions and DEP by identifying the measures that will ensure that adjacent resource areas are not adversely affected during or after completion of the work.

Simplified Review for Work in the Buffer Zone

The Department is proposing to establish a simplified review for eligible activities in the buffer zone using an Order of Resource Area Delineation and set standards for work in buffer zones proceeding under a Notice of Intent. The purpose of these revisions is to steer development away from resource areas and to ease the administrative burden on commissions and the Department. The revisions are designed to preserve the existing jurisdiction and standards of the wetlands regulations, with only minor procedural modifications.

To qualify for the simplified review, work in the buffer zone must be outside of and more than 50 feet from a resource area and located away from other sensitive areas, incorporate stormwater management, and provide erosion controls during construction. An applicant must submit a Notice of Resource Area Delineation, with the fee and abutter notification, to confirm the extent of resource areas and the buffer zone and to certify eligibility. The conservation commission would confirm the delineation through an Order of Resource Area Delineation, which would be recorded. A commission may require a Notice of Intent if the Stormwater Management Plan does not meet Department standards. If an Order of Resource Area Delineation is appealed to DEP, the Department may conduct its own site visit or may affirm an Order based on information in the Notice and appeal when the

delineation was performed and certified by a professional or other person with relevant expertise.

Bordering Vegetated Wetlands: the 5000 sq. ft. Provision

The regulations for bordering vegetated wetlands give issuing authorities the discretion to allow the loss of up to 5000 sq. ft. of bordering vegetated wetlands. To improve consistency in the application of this provision, text has been added to guide the exercise of discretion. The basic concepts of avoiding, minimizing, and mitigating impacts will ensure that these fragile resources are appropriately protected. The text is similar to the introductory language on the exercise of discretion for limited projects.

Stormwater Management

A reference to the Department's Stormwater Management Standards has been added to the section on orders of conditions, to ensure that applicants and conservation commissions appropriately apply the standards to projects. The Department's Stormwater Standards, consistently implemented, will greatly reduce wetland and water quality impairments from stormwater runoff.

Coastal Mouth of River

To improve the clarity, consistency, and predictability in determining the location of the mouth of a river at the coast for purposes of implementing the Rivers Protection Act, the Department has developed maps showing the location of the mouths of coastal rivers. The Department has provided these maps to conservation commissions for their review, and the maps are available for public comment along with these proposed regulatory revisions.

Enforcement

The Department is proposing to strengthen the enforcement provisions, to explicitly state that continuing violations, such as leaving fill in place or failure to restore, are violations of the Act. Failure to comply with a certification and misleading or inaccurate statements in an application or certification are also subject to enforcement. Finally, the Department is proposing to include in the regulations the statutory language giving the Department and conservation commissions the right to enter private property to enforce the Act.

Appeals to Adjudicatory Hearings

For many years the Department has extended the opportunity to request an adjudicatory hearing to the same parties that may request a superseding order or determination by a regional office. The parties who may request review by the regional office are identified specifically in the Wetlands Protection Act. Because the statute does not specify adjudicatory appeal rights, parties who must be provided an opportunity for a hearing are defined under M.G.L. Chapter 30A as those with constitutional or other statutory rights. The Department's extension of appeal rights beyond minimum requirements has led to

delays in resolving appeals and questions about the legitimacy of appeals that appear to lack a true environmental basis.

In this proposed revision, the Department has added requirements for participation by aggrieved persons or ten resident groups in the permitting process, so that the Conservation Commission or the Department may consider objections prior to issuance. Previous participation means submitting written information to the conservation commission, requesting the superseding order, or by providing written information to the Department. The Department is proposing to continue to extend the opportunity to request adjudicatory hearings to conservation commissions for all cases, acknowledging their critical role in administering the Act. Abutters will continue to receive notice of the filing of a Notice of Intent and may request a Superseding Order but may no longer request an adjudicatory hearing unless they can show they are aggrieved.

Finally, a proposed revision to the section on variances requires the Department to solicit public comments through a notice in the Environmental Monitor, replacing appeals to an adjudicatory hearing. Experience with abutter appeals and variances suggests that extension of appeal rights has overburdened the Department and too often served as an opportunity to delay projects, undermining legitimate wetlands protection efforts.

Abutter Notification

Amendments to the Wetlands Protection Act require applicants to provide notice to abutters at the time of filing of a Notice of Intent. The Department is proposing to incorporate this requirement in the regulations.

Conclusion

The Department encourages comments on these proposed regulations from conservation commissions, developers, environmental advocates, and all other interested persons. The Department believes that these proposed revisions are consistent with its obligation to provide due process and to allocate appropriate resources among its permitting, enforcement and technical assistance responsibilities. The Department will carefully consider all public comments received prior to promulgation of the final regulations to be effective in the fall.